Public Prosecutor v Yong Kean Teck

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–95 OF 2003
MOHAMED APANDI ALI J
4 JUNE 2008

Criminal Procedure — Appeal — Fact, finding of — Approach of appellate court — Trial court's findings of facts properly evaluated and tested against prosecution's evidence — Whether appellate intervention warranted

The respondent was called upon to enter his defence to a charge under s 471 read with ss 467 and 34 of the Penal Code but acquitted and discharged by the sessions' court judge at the end of the trial. The prosecution appealed to the High Court against the sessions' court judge's findings of fact. The prosecution contended that the judge's findings of fact at the end of the trial were inconsistent with the findings of facts at the end of the prosecution's case.

Held, dismissing the appeal:

(1) In acquitting and discharging the respondent at the end of the trial, the sessions' court judge had properly evaluated the facts as adduced at the trial. The trial judge made various findings of fact — such findings properly tested with the evidence adduced by the prosecution (see para 8).

(2) An appellate court should be slow to interfere with the findings of fact by a lower court. In the instant appeal, the sessions' court judge had correctly evaluated the evidence against the respondent, including the issues of knowledge and common intention. The judge had accepted the explanations given by the respondent during his defence. The judge's acceptance of such explanations, when tested against the prosecution's evidence was reasonable. There was therefore no reason for the High Court to vary the findings of the sessions' court judge (see paras 14–16); *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 followed.

[Bahasa Malaysia summary

Responden telah dipanggil untuk memasukkan pembelaannya terhadap

pertuduhan di bawah s 471 dibaca bersama ss 467 dan 34 Kanun Keseksaan tetapi telah dilepas dan dibebaskan oleh hakim mahkamah sesyen di akhir perbicaraan. Pihak pendakwaan telah merayu ke Mahkamah Tinggi terhadap penemuan fakta hakim mahkamah sesyen. Pihak pendakwaan menegaskan bahawa penemuan fakta oleh hakim di akhir perbicaraan tidak konsisten dengan penemuan fakta di akhir kes pendakwaan.

Diputuskan, menolak rayuan:

(1) Dalam melepas dan membebaskan responden di akhir perbicaraan, hakim mahkamah sesyen telah menilai dengan sewajarnya fakta sepertimana yang dikemukakan semasa perbicaraan. Hakim perbicaraan telah membuat pelbagai penemuan fakta — penemuan sedemikian sewajarnya telah diuji dengan keterangan yang dikemukakan oleh pihak pendakwaan (lihat perenggan 8).

(2) Mahkamah rayuan harus cuba untuk tidak campur tangan dengan penemuan fakta oleh mahkamah bawahan. Dalam rayuan ini, hakim mahkamah sesyen telah menilai dengan betul keterangan terhadap responden, termasuklah isu tentang pengetahuan dan niat bersama. Hakim telah menerima penjelasan-penjelasan yang telah diberikan oleh responden semasa pembelaannya. Penerimaan hakim tentang penjelasan sedemikian, apabila diuji dengan keterangan pihak pendakwaan adalah munasabah. Oleh itu tiada sebab untuk Mahkamah Tinggi mengubah penemuan hakim mahkamah sesyen tersebut (lihat perenggan 14–16); *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 diikut.]

Notes

For cases on finding of fact, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 395–469.

Cases referred to

PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (folld)

Anas Ahmad Zaki (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Harjeet Singh Sidhu (PS Sohanpal & Sidhu) for the respondent.

Mohamed Apandi Ali J:

[1] This is an appeal by the prosecution against the decision of the lower

A sessions court judge who acquitted and discharged the respondent at the end of a trial.

THE CHARGE

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[2] The trial that proceeded against the respondent was based on an amended charge, which reads as follows:

> Bahawa kamu bersama-sama dengan dua orang lagi yang masih bebas, pada 9 April 1999 di Oriental Bank Berhad, Cawangan Selayang di dalam daerah Sentul dalam
> C negeri Wilayah Persekutuan Kuala Lumpur dan untuk mencapai niat bersama kamu telah dengan curangnya menggunakan sebagai tulin sekeping cek iaitu cek Perwira Affln Bank Cawangan Kementah No Siri 223153 bernilai RM3,760,500.38 yang kamu mempunyai sebab untuk mempercayai pada masa
> D kamu menggunakannya, ianya adalah cek palsu dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 471 Kanun Keseksaan dibaca bersama s 467 dan s 34 Kanun yang sama.

[3] The main trust of the appellant's appeal, as can be seen in the petition
E of appeal, is the dissatisfaction with the *finding of facts*, namely on three issues:

(i) common intention;

F (ii) knowledge on the part of the respondent; and

(iii) the element of dishonest intention.

[4] The appellant's argument is that the findings of fact at the end of the
G trial are inconsistent with the finding of the facts at the end of the prosecution's case.

BRIEF FACTS OF THE CASE

H **[5]** The case against the respondent revolved over a Perwira Affin Bank cheque, No 223153 purportedly issued by the Ministry of Defence in favour of Xin Mei Hua Metal Works (M) Sdn Bhd on 25 March 1999 for a sum of RM3,760,500.38. This particular cheque, No 223153, which is the subject matter of the charge was produced and marked as exh P2. This particular
I cheque (P2) was later credited into the account of the said named payee company, which belongs to the respondent. The company's bank account is with Oriental Bank Bhd, Selayang and the sum was credited on 9 April 1999. On 12 April 1999, the respondent cashed out RM2m from this Oriental Bank account via two cash cheques (exhs P12 and P13). Beside the

withdrawal of the RM2m in cash, the respondent made a telegraphic transfer on the same day a sum of RM1,740,000 into the account of Hujan Baiduri Sdn Bhd (as proven by exh P14).

[6] From the above facts, the learned trial judge was satisfied that there was a prima facie evidence for an offence as preferred in the amended charged.

[7] In his defence, where the respondent gave evidence under oath, he gave briefly the following explanations:

(a) His company's account was used to credit the P2 cheque at the request of one Mr Lim who explained that the latter's account could not be used as his account has been blacklisted.

(b) The respondent was introduced to the said Mr Lim by SP13, Loh Wooi Fooi and the respondent received the cheque (P2) through the introducer, SP 13.

(c) The cheque, P2 was banked-in into respondent's account at the Oriental Bank Bhd, Selayang Branch, Kuala Lumpur by SP8, Ng Chin Fai. It was on Friday, 9 April 1999.

(d) On the instructions of the abovesaid Mr Lim, the respondent withdrew RM2m from his account at Oriental Bank Bhd Selayang Branch. The branch did not have sufficient cash, and the respondent had to wait for some time as the bank have to make arrangements for respondent at various other banks that have sufficient cash. The respondent was directed to go to the Bank of Commerce, Perwira Affin Bank, Oriental Bank Bukit Beruntung Branch and Oriental Bank Wangsa Maju Branch.

(e) While waiting, the respondent acting an instructions of the said Mr Lim made the telegraphic transfer of monies (as in P14) to Hujan Baiduri (M) Sdn Bhd. The particulars of the company were given by Mr Lim.

(f) On the instructions of Mr Lim, the respondent handed the cash which was collected from the five banks to one male Chinese.

(g) About one month later, in May 1999, the respondent saw his photograph in a Chinese newspaper with a caption that he was wanted by police. The respondent immediately called the Police Headquarters in Bukit Aman and upon been told that the matter involved using a false cheque, the respondent surrendered himself to the police. The respondent gave full cooperation to the police in their investigations.

(h) The respondent also explained that he surrendered himself because he wanted to clear his name.

A EVALUATION OF FINDING OF FACT

[8] In acquitting and discharging the respondent at the end of the trial, the learned trial judge had properly evaluated the facts as adduced at the trial. The trial judge made various findings of facts. It is to be noted that such finding of facts at the end of the trial was properly tested with the evidence adduced by the prosecution. This evaluation process by the trial judge, can be seen in the grounds of judgment, from pp 273–280 of the appeal record.

[9] Upon perusal of the appeal record, it is clear from the prosecution's evidence, when tested with the testimony of the respondent, such evidence will negate the element of knowledge on the part of the respondent. For example: SP3, Julia bt Mohd Ukil, an assistant accountant with the Ministry of Defence, testified that if one has dealings with her Ministry one would be able to identify a genuine cheque issued by her Ministry. The respondent did not have any dealing with the Ministry.

[10] SP5, Norazlinda bt Abdul Hamid, a teller at the Oriental Bank Selayang, testified as follows (at p 74 of the appeal record):

> P2 — dirujuk kepada saksi. Saya terima cek ini pada 9 April 99. Pada hari tersebut saya tidak ada sebab-sebab yang munasabah bahawa ada apa-apa yang tidak kena dengan cek ini. Ya, cek ini adalah cek Kerajaan. Dari pengalaman saya cek Kerajaan tidak pernah ditendang. Itu adalah salah satu sebab antara banyak sebab mengapa saya terima cek ini pada hari itu.

[11] From such evidence, if a bank teller has no reason to believe that P2 is a forgery, how can the respondent is expected to have any such belief or knowledge.

[12] SP13, Loh Wooi Fooi, a businessman, in his evidence said (at p 143 of the appeal record):

> Ya, pada masa itu saya definitely have no reason to suspect the cheque was forged. Selepas terima cek saya hubungi Mr Yong. Mr Yong beritahu saya dia ada around Selayang.

[13] SP14, Kamaruzaman bin Kamaruddin, the investigating officer from Commercial Crime Division in Bukit Aman testified that in this case it involved a syndicate, and that he *not sure* of the degree of involvement of the respondent in the syndicate. SP14's evidence reads as follow:

> Dari siasatan saya cek-cek ini P1–P5 adalah satu sendiket di mana Mr. Michael dan Lim terlibat. Akaun Hujan Baiduri dioperasikan oleh Mahmur dan Dzalin. Dari siasatan saya OKT tidak diketahui oleh kedua-dua lelaki/mengenali OKT.

[14] With such evaluation and such finding of fact, in hearing this appeal, I took the approach as guided by the often quoted Federal Court case of *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79. On reference on a question of law, the Federal Court held that (at p 80):

> an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. In this case, on the evidence, the learned judge was wrong in quashing the conviction. Therefore the answer to the reference is in the negative.

EVALUATION OF THE DEFENCE EXPLANATION

[15] The learned trial judge, according to her grounds of judgment (from pp 273–280 of the appeal records) has correctly evaluated the evidence against the respondent, including on issues of knowledge and common intention. The trial judge accepted the explanations given by the respondent during his defence. Such explanations, when tested against the prosecution's evidence it can be seen that the reasons and decision to accept the explanations, are reasonable. Such a conclusion is a cumulative finding of facts, founded on the facts adduced at the trial. Such findings of fact are consistent with the evidence and facts adduced.

CONCLUSION

[16] As such there is no reasonable reason for this court to vary such findings.

[17] In such light, it is my finding that the trial judge has not erred in law or in her findings of facts. Therefore the appeal by the prosecution is hereby dismissed.

Appeal dismissed.

Reported by Andrew Christopher Simon